

1 **BEFORE THE BOARD OF MEDICAL EXAMINERS**
2 **OF THE STATE OF NEVADA**

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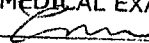
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5 In The Matter of Charges and)
6 Complaint Against)
7 **CLIFFORD CARROL, M.D.,**)
8)
9 Respondent.)
10 _____

Case No. 08-20231-1

FILED

SEP 16 2010

NEVADA STATE BOARD OF
MEDICAL EXAMINERS

By: 

11 **ORDER OF DISMISSAL WITHOUT PREJUDICE**

12 The above-entitled matter came on regularly for decision before the Nevada State
13 Board of Medical Examiners, hereinafter "Board," on Friday, September 10, 2010, at the
14 Board's offices located at 1105 Terminal Way, Suite 301, Reno, Nevada, 89502, and by
15 videoconference at the offices of the Nevada State Board of Dental Examiners located at
16 6010 S. Rainbow Boulevard, Building A, Suite 1, Las Vegas, Nevada 89118, on the Motion
17 of Clifford Carrol M.D. to Dismiss Board Complaint. Present on behalf of Respondent
18 Clifford Carrol, M.D. were his counsel Sherman Mayor, Esq. and Cheryl Horner, Esq.

19 The members of the Board participating in the decision were Mr. Van V. Heffner,
20 Beverly Neyland, M.D., Michael Fischer, M.D., Ms. Valerie Clark, BSN, RHU, LUTCF, and
21 Ms. Donna A. Ruthe. All other remaining members of the Board who were present, being
22 members of the Investigative Committee that issued the complaint in this matter or having
23 been involved in the investigation, were excused from participating and took no part in the
24 proceedings of the Board. Keith D. Marcher, Senior Deputy Attorney General, acted as
25 legal counsel to the Board.

26 The Board received and reviewed the formal disciplinary Complaint filed by the
27 Investigative Committee on November 24, 2008 and the Synopsis of the Record and
28 Recommendations to the Board of Medical Examiners on the Motion of

1 Clifford Carrol, M.D. to Dismiss Board Complaint, filed on June 8, 2010 by the Hearing
2 Officer appointed to hear this matter.

3 Upon review of the Synopsis and upon consideration of all circumstances and facts
4 set forth within the Synopsis, the Board entered the following order:

5 **IT IS HEREBY ORDERED** that the Board adopts the Recommendations to the
6 Board of Medical Examiners filed on June 8, 2010 by the Hearing Officer appointed to
7 hear this matter.

8 **IT IS FURTHER ORDERED** that the Complaint against Clifford Carrol, M.D., in case
9 08-20231-1 is hereby dismissed without prejudice.

10 Done in open session this 10th day of September, 2010.

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12 _____
Charles N. Held, M.D.

13 President

14 Nevada State Board of Medical Examiners
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COPY

BEFORE THE BOARD OF MEDICAL EXAMINERS

OF THE STATE OF NEVADA

* * *

In the Matter of the Charges and Complaint)
Against)
CLIFFORD CARROL, M.D.,)
Respondent.)

CASE NO. 08-20231-1

FILED

JUN 08 2010

NEVADA STATE BOARD OF
MEDICAL EXAMINERS

SYNOPSIS OF THE RECORD AND RECOMMENDATIONS
TO THE BOARD OF MEDICAL EXAMINERS ON THE MOTION OF
CLIFFORD CARROL, M.D. TO DISMISS BOARD COMPLAINT

I.

JURISDICTION AND, CHARGES

NRS 630.301 authorizes the Nevada State Board of Medical Examiners, hereinafter referred to as the "BME", to take disciplinary action against physicians licensed by the BME for acts and omissions to act which forfeit – or otherwise impair and limit - the privilege of such licensees to practice medicine within the State of Nevada.

Pursuant to this statutory authority the BME has promulgated administrative regulations spelling out the various acts and omissions to act that constitute legal ground for bringing disciplinary action against a licensee.

This matter commenced as of the November 24, 2008 filing of a Complaint against the Respondent flowing from his "ownership interest in the Endoscopy Center of Southern Nevada, LLC", hereinafter referred to as the "ECSN", and the assertion that in that ownership capacity Respondent "was in a

1 position to be involved in and responsible for the medical, clinical, and
2 administrative decisions by which the ECSN practice was operated”.

3
4 Based on the testimony adduced, the evidence received and the arguments
5 made, this Synopsis of the Record was prepared - and is presented - by the
6 undersigned Hearing Officer pursuant to Chapter 630 of the Nevada Revised
7 Statutes.

8 The charges lodged against the Respondent assert that on September 27,
9 2007 the Respondent performed a colonoscopy on Patient A¹, who allegedly was
10 known by the Respondent to suffer from hepatitis C at the time of his treatment by
11 Respondent. It was further asserted in the Complaint that Respondent treated
12 Patient B on that same day and that Patient B subsequently tested positive for
13 hepatitis C and that the virus found in Patient B was genetically linked and could be
14 traced back to Patient A. The Complaint asserted that Patient B contracted hepatitis
15 C while at ECSN for the colonoscopy due to unsafe practices and policies permitted
16 by the Respondent at the endoscopy center, “including, but not limited to, unsafe
17 injection practices, reuse of equipment intended to be single use, inappropriate
18 cleaning of scopes used in procedures, and an extremely high daily volume of patient
19 procedures”.

20
21 In the Complaint Respondent was alleged to have committed malpractice
22 as a physician by failing “to use the reasonable care, skill, or knowledge ordinarily
23 used under similar circumstances” by physicians in good standing practicing in the
24 same specialty as the Respondent.
25

26
27 ¹ Pursuant to the rules and regulations of the BME, the true identity of any patient referred to in the
28 Charges and Complaint is made known to a licensee by a separate Patient Designation, which
pleading is not made public due to privacy considerations mandated by the Health Insurance

The instant administrative licensing proceedings originated from an outbreak of hepatitis C cases in Southern Nevada initially discovered and widely broadcast by the Southern Nevada Health District, hereinafter referred to as the "SNHD". The SNHD asserted that the noted defective practices of the ECSN and associated Endoscopy clinics operated by the Respondent and other licensed physicians in Las Vegas, Nevada had similarly infected a number of patients with hepatitis C that was genetically linked to known hepatitis C patients who underwent colonoscopies at ECSN during the applicable time frame.

The Complaint against the Respondent was commenced by the BME based on the medical records obtained by the BME at the outset of the discovery of the Hepatitis C Outbreak by the SNHD and that sister governmental agency's public announcements of the outbreak and notification of approximately 50,000 patients treated at the endoscopy centers of their need to be tested for possible infection due to the unsafe practices alleged to have been followed in those medical treatment facilities.

II.

PROCEDURAL AND SUBSTANTIVE RECORD OF PROCEEDINGS

On December 22, 2008 the Respondent filed his Answer to the Complaint with the Pre-Hearing Conference to lay the groundwork to address the merits of these charged scheduled for April 30, 2009 and the contest-case hearing to hear and decide this matter on the merits fixed for June 22, 2009.

On April 21, 2009 the Respondent filed and served on the parties hereto a Motion to Continue the Pre-Hearing Conference and Hearing. This pleading was

Portability and Accountability Act of 1996 (HIPAA).

1 based on proceedings in the Eighth Judicial District Court of the State of Nevada in
2 regard to the parallel civil tort litigation involving the alleged hepatitis C infection of
3 patients at the endoscopy clinics. These lawsuits had been stayed due to the efforts
4 by the SNHD to restrict access to, and the use of, its investigators, experts and
5 records upon which the Hepatitis C Outbreak was initially brought to light by the
6 SNHD.
7

8 Based on this Motion the parties to these proceedings mutually agreed to
9 vacate and continue the previously scheduled Pre-Hearing Conference and Hearing.
10 This agreement was based on the fact that (1) Many of the key witnesses working at
11 the Endoscopy centers who would be called upon to testify in the civil litigation -
12 and these licensing procedures - including other licensed physicians, CRNA's, PA's
13 and Nurses had asserted their Fifth Amendment right not to testify substantively at
14 the present time pending the filing of the potential criminal charges then currently
15 the subject of on-going investigations in Clark County, Nevada; and (2) The
16

17 SNHD's refusal to provide its key witnesses, Dr. Brian Labus and Dr.
18 Lawrence Sands, as well as their deposition transcripts and the agency's investigative
19 records to the civil litigants or any other party until the final investigative report of
20 the SNHD was issued.
21

22 At the time this continuance was stipulated to by the parties said final
23 report had been represented by the SNHD as being in the process of being finalized.

24 From the outset of the announcement of the Hepatitis C Outbreak these witnesses
25 and their investigation interviews, records, notes, testing, and other documents and
26 scientific evidence have been at the epicenter of this entire matter.
27
28

1 As a result of the parties' agreement, on May 7, 2009 the Hearing Officer
2 issued an Order Vacating and Continuing Hearings and Scheduling Status
3 Conference. Attached to the Order was a photocopy of the April 6, 2009 Decision
4 issued by the Honorable Allan R. Earl, District Judge *In the Matter of Endoscopy Center*
5 *and Associated Businesses and Coordinated Cases*, being Case No. A558091, pending in the
6 Eighth Judicial District Court, Clark County, Nevada.
7

8 This decision concerned the refusal of the SNHD to allow any third-party
9 the use of the medical records seized by that agency, including upon information and
10 belief, the genetic testing pertinent to this controversy performed by the Center for
11 Disease Control, and the expert opinions of Dr. Labus and Dr. Sands in any related
12 judicial or administrative proceeding.
13

14 By extension, this stance effectively constituted a "gag order" on the
15 BME's use of this evidence. Such denial effectively stayed the ability of the BME to
16 proceed with its administrative proceedings to hear and determine if the alleged
17 practices of Respondent and similarly licensees of the BME fell below the applicable
18 standards for the practice of medicine in the State of Nevada.
19

20 In his decision Judge Earl wrote at pages 7 and 8:

21 "After careful consideration, it is this Court's decision that the
22 non-patient specific documents which the SNHD wishes to
23 withhold are indeed protected by the "Deliberative Process
24 Privilege" so long as the final report has not been finalized and
25 released. This Court disagrees with the Special Master's opinion
26 that any documents relied on by the SNDH to produce the
27 interim report or public statements have lost whatever
28 "Deliberative Process Privilege" they may once have held. The
documents in question to the Court's satisfaction, are "pre-
decisional and deliberate."

Counsel for SNHD has made it clear that the Department is in
the process of formulating its final report. There are currently
thousands of documents, including health records,

1 questionnaires, investigative reports, interview notes, etc. that
2 have been gathered by the SNHD in investigating the Hepatitis C
3 Outbreak. Any documents which the SNHD deems to be pre-
4 decisional, deliberative, pointing to the agency's decision or
5 report or policy, and consisting of opinion, recommendation or
6 advice about agency policies are protected and need not be
7 produced. Any non-patient specific documents that do not fall
8 into one of these categories and are not protected under other
9 State and/or Federal Statutes must be produced. As earlier
10 stated, the SNHD is encouraged to protect only those documents
11 that are absolutely privileged and confidential. The Court also
12 notes that the process of deciding which documents will and will
13 not fall under the "Deliberative Process Privilege" is inherently
14 disruptive and until the final report is produced and disseminated,
15 the SNHD is directed to not take any extraordinary measures to
16 gather, review or catalogue them." [Emphasis in the original].

17 Earlier in this decision District Judge Earl, in balancing the varying
18 interests involved in the discovery dispute, noted at page 4:

19 "The SNHD is "strongly encouraged" to continue to produce
20 any and all documents other than those that have a distinct
21 privilege as set forth by Statute and by this Decision and Order."

22 In an explanatory footnote to this language, the Court noted at page 4:

23 "The terminology "strongly encouraged" is a judicial euphemism
24 for "just do it now" and in so doing, retain flexibility to make
25 decisions on what is and what is not privileged. Simply throwing
26 a uniform cloak over all documents and declaring everything to
27 be confidential may well result in an Order from this Court to
28 produce most, if not all, of the investigative files that relate to the
Hepatitis C investigation."

The ruling of District Judge Earl has been challenged by the SNHD on
appeal to the Nevada Supreme Court. This challenge seeks to overturn Judge Earl's
ruling that the withheld documents and the depositions are subject to discovery once
the final report is "finalized and released." The SNHD argues that such material
should never be released at any time and has obtained a stay of any use of its records
and the depositions of its experts pending a final ruling from the Nevada Supreme

1 Court. See *In The Matter of Endoscopy Center and Associated Businesses and Coordinated*
2 *Cases*, being Case Number 53676 before the Supreme Court of the State of Nevada.

3 On May 18, 2009 the Nevada Supreme Court entered its Order Granting
4 Temporary Stay and Directing Answer in response to the SNHD's original petition
5 for writs of mandamus and prohibition challenging the district court order of
6 District Judge Earl. In this Order, the Nevada Supreme Court wrote, "we deny the
7 request for stay of so much of the district court's order as requires the petitioner to
8 prepare weekly privilege logs. However, we temporary stay the remainder of the
9 district court's April 7, 2009 order; the disclosure of the sealed deposition transcripts
10 of Dr. Brian Labus, Dr. Lawrence Sands, and Patricia Aramour; and any subpoenas
11 served on petitioner by the parties to the underlying case requesting documents or
12 testimony that petitioner claims are privileged or otherwise protected."
13

14 This stay is still in force and effect as of the present time despite the
15 issuance by the SNHD of its final report and continues to prevent the use of the
16 patient records, genetic testing and expert opinions that fueled the original outcry
17 and the preliminary actions taken by the BME.
18

19 The parallel civil tort and potential criminal proceedings have ensnared
20 these administrative proceedings in the labyrinth of discovery and due process
21 flowing from these competing parties - and their diverse interests - as they and the
22 courts seek to balance the interests of the patients, the physicians and the public.
23

24 Bankruptcy filings have further complicated the attempt to resolve the
25 pending charges on their merits. The intervening decision of United States
26 Bankruptcy Judge Mike Nakagawa partially cleared some of the barriers to allowing
27 the civil parties their day in court, but was subsequently further complicated by
28

1 litigation between the insured and their insurers over how to proceed in processing
2 the claims against those insurance policies.

3 Both parties to these administrative proceedings have advised the Hearing
4 Officer that in order to prosecute and defend the charges by the BME both sides
5 need to have access to, and the use of, the investigative reports, depositions and
6 documents involving the alleged involvement of the Respondent in the Hepatitis C
7 Outbreak – subject to the HIPAA and other confidential constraints protecting
8 patients.
9

10 Such access would – as is typical in these disciplinary proceedings - involve
11 indexing and referring to patients by assigned numerical or alphabetic designations
12 and the redaction of personal and medical data not material and relevant to these
13 proceedings.
14

15 In an effort to orderly proceed in light of the impediments blocking the
16 orderly processing of the parallel civil tort and pending criminal proceedings a Status
17 Conference was held on July 14, 2009.

18 This hearing resulted in a further continuation of these administrative
19 proceedings based the continuing impact of the stay preventing the access to and use
20 of the pertinent evidence. Given that lack of any resolution, a follow-up Status
21 Conference was scheduled for October 13, 2009 in the hope that in the interim the
22 evidence bottleneck would be broken.
23

24 On October 13, 2009 discussed the continuing stalemate in obtaining the
25 information represented by the parties as being needed to proceed with these
26 administrative proceedings. Despite this continuing quagmire, the parties agreed at
27 that time to re-set these proceedings for a Pre-Hearing Conference and Hearing and
28

1 to concurrently requested that subpoenas be issued for the testimony of the principal
2 individuals involved in the SNHD investigation and for the production of that
3 agency's investigative files insofar as such documentary and scientific evidence was
4 material and relevant to the charges pending in these administrative proceedings.
5

6 The authorized subpoenas involved obtaining the use of all relevant and
7 material evidence in the possession of the Respondent and/or the BME to the
8 extent such material was subject to the SNHD's continuing "gag order" thrown over
9 such utilization.

10 This matter was set for a Pre-Hearing Conference to be held on January 19,
11 2010 with the Hearing scheduled for March 8, 2010.
12

13 In connection with rescheduling this matter for hearing, subpoenas were
14 issued for the appearance of Dr. Sands, Dr. Labus and the Custodian of Records of
15 the SNHD compelling their appearance for examination as to all relevant and
16 material facts involving their participation in the SNHD investigation of the
17 Hepatitis C Outbreak insofar as said participation involves the alleged acts or
18 omissions to act of the Respondent.

19 These subpoenas required Dr. Sands, Dr. Labus and the Custodian of
20 Records to bring with them at the time of their appearance and to produce and
21 permit inspection and copying for such administrative purposes of the following
22 documents: (1) Any and all videotaped depositions of any depositions of Dr. Sands
23 and Dr. Labus in regard to said individuals' participation in the SNHD'S
24 investigation of the Hepatitis C Outbreak insofar as said videotapes involved the
25 alleged acts or omissions to act of the Respondent; (2) Any and all transcriptions of
26 any such videotaped depositions; (3) Any and all investigative interim and/or final
27
28

1 reports in regard to the SNHD investigation of the Hepatitis C Outbreak involving
2 the alleged acts or omissions to act of the Respondent including, but not limited to
3 any health records, questionnaires, investigative reports, interview notes and as well
4 as any other documentary evidence involved in that investigative and reporting
5 process, and providing in regard thereto that any videotapes and records produced in
6 response to this subpoena would be subject to the HIPAA and other confidential
7 constraints protecting patients, including, but not limited to the indexing and
8 reference to patients identified in such videotapes or documents by assigned
9 numerical or alphabetic designations to such individuals and the redaction of
10 personal and medical data of such patients not material and relevant to these
11 proceedings.
12

13
14 The Pre-Hearing Conference was subsequently moved to January 20, 2009
15 in order to accommodate the schedules of the parties.

16 At the Pre-Hearing Conference the parties indicated the service of the
17 subpoenas on Dr. Sands, Dr. Labus and the SNHD Custodian of records had been
18 made and rejected by legal counsel for the SNHD on technical grounds. The
19 rejection essentially involved the asserted failure of the BME to provide – or identify
20 – the nominal witness fees normally due to such parties. In essence, even if factually
21 correct, the money would be paid by one public entity to another public entity and
22 would typically be cured - in the practice of basic civility by lawyers - by a telephone
23 call to advise of that contention and to resolve the matter.
24

25 While these disputes were unresolved, in December 2009 the SNHD
26 issued a generic final report. Despite this action, the SNHD continued to object to
27 the production of Dr. Sands, Dr. Labus and/or the cited documentary evidence.
28

1 In so doing the SNHD maintained that the appeal by the SNHD to the
2 Nevada Supreme Court seeking to insulate this core evidence from ever having to be
3 disclosed was protected by the temporary stay order by that judicial body pending a
4 final ruling on petition for writs of mandamus and prohibition seeking to
5 permanently prevent that disclosure.
6

7 In essence the SNHD's position it that such testimony and evidence never
8 will be made available to the public that the SNHD serves along with the BME.

9 Given the continuing refusal of the SNHD to cooperate with the parties to
10 these proceedings, the parties requested that the scheduled hearing once again be
11 continued. As a result of this request, in lieu of being able to hear this disciplinary
12 matter of its merits, another Status Conference was scheduled for April 9, 2010.
13 During the interim it was the goal of the parties to these administrative proceedings
14 that they joint effort would finally succeed in obtaining the requisite material and
15 relevant evidence to allow for the final disposal of the charges and defenses on their
16 respective merits and in the light of public scrutiny - not bureaucratic obfuscation.
17

18 In fixing the new Status Conference date the re-issuance of the subpoenas
19 was requested with the parties agreeing that, should the SNHD once again fail to
20 comply with the subpoenas, the BME take such actions as allowed under the Nevada
21 Revised Statutes to required such attendance, production and testimony.
22

23 These efforts to obtain and/or use the relevant and material evidence
24 continued despite the February 20, 2010 letter from the outside legal counsel hired
25 by the SNHD to BME General Counsel Beggs threatening liability for costs and fees
26 should this sister governmental agency pursue its efforts to discharge its public duty
27 to oversee physicians licensed to practice medicine in the State of Nevada.
28

1 In this correspondence outside legal counsel wrote that the SNHD "is not
2 at liberty to disclose any of the confidential and sealed information that is requested
3 in these subpoenas."
4

5 This correspondence noted, and attached, a filed-stamped photocopy of
6 the May 18, 2009 Nevada Supreme Court Order Granting Temporary Stay and
7 Directing Answer issued pursuant to the writ of mandamus and prohibition filed by
8 the SNHD challenging Judge Earl's ruling in regard to the disclosure of the
9 information ordered disclosed by Judge Earl upon the issuance of the SNHD'S final
10 report.
11

12 In advising the BME that this sister governmental regulatory agency cannot
13 access this source factual and scientific information, outside legal counsel for the
14 SNHD threatened, "if the Medical Board continues to pursue this matter, despite its
15 non-party status in these proceedings, SNHD will pursue the instigating party for all
16 reasonable legal expenses, including but not limited to attorney fees and costs."
17

18 Despite this threat, the BME pursed the subpoenas in order to allow for
19 the use of such relevant and material evidence in these administrative proceedings.
20

21 The SNHD again refused to comply with the subpoenas which
22 recalcitrance forced the BME to file in the Eighth Judicial District Court a Petition
23 seeking an order compelling the SNHD to comply with the subpoenas.
24

25 This refusal to allow the access to and/or use of the relevant evidence
26 again delayed disposing of the charges on the merits. In the interim the Respondent
27 renewed his earlier objections to the delays in allowing him to refute the charges
28 pending in these administrative proceedings, noting that he was suffering personally
and professionally not being provided due process in a timely manner.

1 On May 18, 2010 Respondent filed a Motion to Dismiss the Complaint in
2 this matter based on the continuing inability either the BME or the Respondent to
3 access and/or use the relevant and material evidence upon which the instant
4 Complaint is based.

5
6 As noted in this Motion by the Respondent:

7 "Undersigned counsel represents Dr Carrol in both the civil
8 litigation and this case before the Nevada State Board of Medical
9 Examiners. In 2009, the depositions of Brian Labus (SNHD
10 Epidemiologist) and Dr. Lawrence Sands (SNHD Medical
11 Director) were taken. The depositions lasted a number of days.
12 During the depositions, some parts of each deposition were
13 deemed confidential, to be revealed only upon Court order.

14 However, during the depositions, the SNHD promptly moved to
15 seal the entirety of both depositions. Indeed, the SNHD became
16 so concerned about the revelation of its records and testimony
17 pertaining to its investigation that it asserted numerous privileges
18 to block production of any such evidence."

19 The Motion continued:

20 "The SNHD's final report, however, is virtually useless as
21 evidence. Names, dates, times and actions/inactions are not
22 provided. Any innuendo in the report is framed in double and
23 triple hearsay, and is unsupported by specific evidence. To date
24 no case in the underlying civil litigation has gone to trial where a
25 physician, nurse or CRNA's care was under challenge. The only
26 case which has been tried, the *Chanin* case (the \$500,000,000.00
27 punitive damage case), was tried solely against the product
28 manufacturers. In their defense the manufacturers argued their
product was not defective, and their labeling was appropriate. As
such the investigative records and witnesses of the SNHD were
not at issue."

 While these efforts to compel the SNHD to comply with the BME
subpoenas were pending, in May 2010 before Eighth Judicial District Judge Leavitt
heard a similar motion in regard to litigation against an HMO which involved the
need to compel the SNHD to produce its witnesses and documents for the purposes
of that litigation. In this case, the so-called *Regidor* litigation, District Judge Leavitt

1 ruled that the temporary stay issued by the Nevada Supreme Court did not apply
2 since the underlying action did not involve either tort or licensing matters.

3 On May 13, 2010 Eighth Judicial District Judge Bell heard oral arguments
4 by the BME, the Respondent and the SNHD on the Motion to Compel the SNHD
5 to honor the subpoenas re-issued to that governmental entity. The interim ruling by
6 the court was to defer a decision on the Motion to Compel for 90 days, apparently in
7 the hope that within that time frame the Nevada Supreme Court would dissolve or
8 otherwise rule on the merits of the underlying action upon which the temporary stay
9 is based.
10

11 As noted in the Motion to Dismiss:

12 "In filing this Motion to Dismiss, Dr. Carrol is in no way
13 intending to cast aspersions, or challenge the good faith,
14 regarding the Nevada State Board of Medical Examiners' efforts
15 to bring this matter to hearing and to obtain the SNHD evidence.
16 To the contrary, it appears the Board has now exhausted its legal
17 and administrative remedies. And yet, the SNHD records and
witnesses are unavailable. As such there is no ability to schedule
a meaningful hearing for Dr. Carrol with respect to the complaint
brought against him in 2008 in this matter."

18 In arguing for the dismissal of the instant Complaint the Respondent noted
19 the harm visited on him as a result of the lingering of the charges in these
20 administrative proceedings:

- 21 1. The Respondent's medical group has been dropped from the provider
22 menus of major health insurance carrier(s) because of the pending
23 Board complaint.
- 24 2. Dr. Carrol has already lost one of his three partners. It is believed that
25 the pending Board complaint was a significant factor in the loss.
- 26 3. Dr. Carrol has lost a substantial amount of income because of the
27 pending Board complaint, in that his rainmaking ability is severely
28 circumscribed because of the existence of the complaint.

1 4. Dr. Carrol is not only a physician, but is also a husband and father of
2 three young children. The knowledge of the pending Board complaint
3 by his family, friends and peers is casting a constant stigma over his life
and creates unrelenting angst.

4 5. Although Dr. Carrol has been on a crusade since November of 2008 to
5 clear his name, it may appear at this point (to his friends, peers,
6 potential patient and credentialing bodies) that his explanations as to
why he has not been able to put this matter behind him sound like
hollow excuses.

7 In advancing his Motion to Dismiss the Respondent cited *Potter, M.D. v.*
8 *State Board of Medical Examiners*, 110 Nev. 369, 705 P.2d 132 (1985) for the
9 proposition that a physician cannot be excluded from the practice of his profession
10 without being afforded due process and *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065
11 (1965) for the guaranteed established by the Fourteenth Amendment to the United
12 State Constitution that a defendant has the right to confront the evidence, including
13 to cross examination of any witnesses against the defendant.

14 Finally, the Respondent cited *Interstate Commerce Commission v. Louisville and*
15 *National Railroad Company*, 227 U.S. 88 (1913) as supportive of the harm done to him
16 by the refusal of the SNHD to allow access to and use of its witnesses and
17 documents:
18

19 "All parties must be fully apprised of the evidence submitted or
20 to be considered and must be given opportunity to cross-examine
21 witnesses, to inspect documents and to offer evidence in
22 explanation or rebuttal. In no other way can a party maintain its
rights or make its defenses."

23 The Investigative Committee of the BME objected to the Respondent's
24 Motion to Dismiss pointing-out in so doing that the BME has endeavored, in good
25 faith, to bring this matter to a contested-case hearing.

26 As noted by the Investigative Committee, the inability of the agency to
27 proceed – and in the alternative for the Respondent to advance his asserted defenses
28

1 to the underlying allegations – are based on the effects of the stay which prevents
2 both parties from bringing the facts before an impartial forum for consideration.

3 As such, the risks of impaired memory or the loss of evidence is reduced
4 given the contention by both parties to these disciplinary proceedings that the
5 material and relevant evidence is largely known to the parties and simply unavailable
6 for use at the present time due to the “gag order”. Based on that ability to largely
7 preserve the record for ultimate presentation to an impartial tribunal, the
8 Investigative Committee contends that any dismissal should not be with prejudice
9 when the interests of the public and the Respondent are properly balanced.
10

11 Lastly, the Investigative Committee notes that the allowance of the
12 Respondent to continue his practice of medicine within the State of Nevada
13 ameliorates the negative impact of the damages cited by the Respondent. When the
14 totality of the circumstances are taken into account the Investigative Committee
15 argues, the matter should be allowed to continue for the present time in anticipation
16 of the removal of the restrictions on the access to and use of the SNHD evidence in
17 the near future. In the alternative the Investigative Committee argues, the dismissal
18 of the Complaint, without prejudice, would be more in keeping with the charge given
19 to the BME to safeguard the public while doing little harm to the inescapable fact
20 that a cloud will continue to hang over the head of the Respondent until the charges
21 in the disciplinary and tort cases pending against the Respondent are fully and finally
22 adjudicated.
23
24

25 Based on the actions of the SNHD it is apparent that the SNHD, as a local
26 governmental public agency charged with regulatory duties and responsibilities in
27 connection with the health, safety and welfare of resident of, and visitors to, Clark
28

1 County does not recognize the overlapping duty imposed on the BME to protect
2 that same health, safety and welfare of that constituency whenever any acts or
3 omissions to act by physicians licensed by the BME fail below the minimum
4 licensing standards for practicing medicine within the State of Nevada.
5

6 This stance by the SNHD – in light of its loud proclamations of the risks
7 to the public that occurred as a result of the alleged acts and omissions to act at the
8 ECSN and associated facilities – is puzzling at best.

9 The SNHD raised the cry of widespread harm flowing from the
10 malpractice by these clinics and all of the licensed and non-licenses principals and
11 employees allegedly involved in such acts and omissions to act.
12

13 The SNHD seized the records and caused the scientific testing to be
14 conducted which the SNHD alleges establishes the genetic links between source
15 patients treated at such clinics and the Hepatitis C Outbreak suffered by other
16 patients treated at such facilities.

17 Yet, the SNHD subsequently claims that such relevant and material
18 evidence is sacrosanct - now and forever – and cannot be use by the plaintiffs
19 allegedly infected by such improper treatment nor can the BME use that same
20 evidence in licensing actions against the physicians and health care providers who
21 allegedly fell below the standards of care cited by the SNHD in their widespread
22 allegations of improper conduct causing substantial harm.
23

24 A Catch 22 if ever there was.

25 If this continuing stance of the SNHD was not so serious one would think
26 this was a work of sheer fiction and that the entire matter was a corruption of Peter
27
28

1 and the Wolf thrown in with a mixture of Dorothy being told not to look behind the
2 curtain -- or in its present reincarnation - a "Wicked" retelling of that classic tale.

3 The public and the physicians need to have the facts discovered and the
4 scientific testing performed by the SNHD revealed in the light of day and subjected
5 to the objective review that flows from examining that evidence in a judicial setting.
6

7 Whether the ultimate outcome is to vindicate - or to vilify - the physicians
8 and other health care providers accused of falling below the standard of care
9 required by their licensure by the BME, the public interest demands that such
10 materials be subjected to the engine of truth that flows from a contested-case
11 examination.

12 Legal counsel for the Respondent have expressed their and the
13 Respondent's grave concern that the interminable delays and intractable stance of the
14 SNHD is continuing to cause Respondent to suffer in his reputation and practice.
15 This contention is made despite the Respondent's authorization by the BME to
16 continue his licensed activities pending a final adjudication of the pending charges in
17 these administrative proceedings.
18

19 As noted by the Respondent, the continued inability to face the charges on
20 their merits has taken a toll on the Respondent financially, emotionally and socially
21 with no end in sight. In so stating the Respondent noted that this on-going damage
22 has occurred, and continued to occur, even through his license to practice has
23 continued in force and effect pending a final resolution of the Complaint.
24

25 Given the consequences continuing to be suffered by the Respondent in
26 the court of public opinion, the reluctant choices facing the parties in an effort to get
27 this matter heard and resolved have been previously touched upon in arriving at the
28

1 previous decisions to continue these administrative proceedings in the hope that
2 such evidence will eventually be forthcoming. These options range from
3 recommending to the BME (1) to dismiss the charges outright; (2) to dismissal the
4 charges without prejudice to the BME to re-file charges when the needed evidence is
5 made available; or (3) to holding the current charges in indefinite abeyance. Each of
6 these options involve to one degree or another a fundamental unfairness to one or
7 both of the parties.
8

9 The merits of the allegations first raised by the SNHD cry out to be heard
10 and decided based on hard facts — not by pure speculation or trial in the press.

11 Inherently, delays as exist in this case carry with the inaction the risk of
12 memories fading as well as the legal application of the doctrine of laches or the
13 statute of limitation and repose; and the fundamental unfairness of not moving
14 forward in a timely manner. Such consideration impact the concept of speedy trial
15 and the fundamental fairness that is inherent in according an accused all of the due
16 process required in such matters.
17

18 In making presenting this Synopsis of the Record and Recommendations
19 to the Board of Medical Examiners on the Motion to Dismiss the parties to this
20 proceeding were advised at the occasion of the May 26, 2010 oral arguments that an
21 administrative hearing officer has limited authority to go beyond the specific
22 authority granted by the statutes, rules and regulations governing such administrative
23 officer.
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III.

RECOMMENDATIONS

The Respondent is rightly incensed that, once charged, he has not been permitted his day in court to refute or otherwise answer the allegations lodged against him in the Complaint on file herein. The chagrin of the BME is also noted albeit the impact on the BME has not been as personal and pervasive as it has been for the Respondent.

At first blush the recommendation that the Complaint be dismissed with prejudice has merit. That option loses some of its force and effect when viewed in the context that Respondent has been allowed in the interim to continue to practice his chosen profession while this matter is pending.

The Respondent rightly counters that, with the passage of time, the long-term effects of the cloud over his head caused by the pending charges has harmed his insurance plan options, partnership relationships and his economical and emotional health.

The efforts of the BME to compel the SNHD to be forthcoming continue unabated.

Given that effort and the totality of circumstances noted, the balancing of the interests of the Respondent and the public interest compels the recommendation of the undersigned Hearing Officer that the instant Complaint against the Respondent be forthwith dismissed without prejudice to re-file the existing charges - or similar charges flowing from the original gravamen - subject to the right of the Respondent to raise as affirmative defense any applicable statute of limitations or the

1
2 doctrine of laches warranted under any such further effort in that regard.

3 DATED this 7th day of June 2010.

4 PATRICK D. DOLAN

5 PATRICK D. DOLAN, ESQ.
6 Hearing Officer, Nevada State Board of Medical Examiners
7 Reno, Nevada 89511-1027
8 (775) 722-3656 Telephone (775) 852-7292 Facsimile
9 lawyerpoppy@sbcglobal.net

10 CERTIFICATE OF MAILING

11 I certify that on this day I personally delivered or mailed, postage prepaid,
12 at Reno, Nevada, a true copy of the foregoing Synopsis of Record and
13 Recommendations to the Board of Medical Examiners on the Motion of Clifford
14 Carrol, M.D. to Dismiss Board Complaint addressed to:

15 LYN E. BEGGS, ESQ.
16 General Counsel and Attorney
17 for the Investigative Committee of
18 the Nevada State Board of Medical Examiners
1105 Terminal Way, Suite 301
Reno, Nevada 89502

19 SHERMAN B. MAYOR, ESQ.
20 MAYOR LAW FIRM
21 Attorney for Respondent
2820 West Charleston Blvd., Suite D-35
Las Vegas, Nevada 89102

22 CHERYL D. HORNER, ESQ.
23 HORNER LAW FIRM
24 Attorney for Respondent
241 West Charleston Blvd., Suite 155
Las Vegas, Nevada 89102

25 DATED this 8th day of June 2010.

26 Angelia L. Donohoe

27 Angelia L. Donohoe, Legal Assistant
28 Nevada State Board of Medical Examiners